PENOLONG KANAN PENDAFTAR MAHKAMAH TINGGI JOHOR BAHRU

v.

TAN BENG SOOI

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: J-01-8-1995]
22 NOVEMBER 1996

AUCTION & AUCTIONEERS: *Auctioneer's remuneration - Abortive auction - No bidders - Calculation of remuneration based on circular issued by SAR - Whether circular ultra vires Johor Auction Sales Enactment 1932 and Rules made thereunder - Whether SAR acted judicially in issuing circular - Whether SAR protected by s. 14 of Courts of Judicature Act 1964 - Whether auctioneer must be heard - Whether taxing officer must exercise discretion judicially in determining remuneration*

The respondent, a licensed auctioneer under the Johor Auction Sales Enactment 1932 ('the Enactment'), had conducted two auctions in respect of certain properties ('the property') in Pulau Pinang at the reserve price of RM6 million. On both occasions, the auctions were abortive as there were no bidders. The respondent then sent two bills to the Deputy Registrar of the High Court at Johor Bahru for RM16,015.50 and RM15,573.50 respectively, based on r. 7(b) of the Rules made under the Enactment ('the Rules'). Thereafter, the respondent received two cheques for RM908 and RM466 in settlement of the bills respectively. It was not disputed that the respondent's remuneration was calculated on the basis of a circular ('the circular') issued by the Senior Assistant Registrar ('the SAR') of the High Court at Johor Bahru to its licensed auctioneers.

Dissatisfied, the respondent applied for, *inter alia*: (i) a declaration that the circular was *ultra vires* the Enactment and r. 7(b) of the Rules and, therefore, void and of no effect; (ii) declarations that the fees for the two aborted auctions amounted to RM16,015.50 and RM15,573.50 respectively as per his bills; and (iii) an order that the appellant do pay him his fees which were outstanding. At the trial, the intervener raised the preliminary objection that the respondent's application was irregular, premature and an abuse of process as the respondent had not exhausted the remedy for review available under

O. 59 rr. 34 and 36 of the Rules of the High Court 1980 ('the RHC'). The trial Judge overruled the preliminary objection on account of O. 15 r. 16 of the RHC.

The appellant contended that: (i) r. 7(b) of the Rules is only applicable where the reserve price is kept secret and bidding has started but no sale takes place by reason of the reserve price not been reached; (ii) where a sale by auction is cancelled or postponed by the Court, the Deputy Registrar has a discretion to prescribe the auctioneer's remuneration pursuant to r. 7(a) of the Rules or under the inherent jurisdiction of the Court pursuant to O. 92 r. 4 of the RHC; (iii) the circular is a guideline for the exercise of discretion under r. 7(a) of the Rules; and (iv) the SAR, in issuing the circular, was acting in a judicial capacity and, thus, was protected by s. 14(1) of the Courts of Judicature Act 1964 ('the CJA').

In the result, the trial Judge found for the respondent and the appellant appealed to the instant Court.

Held:
Per Abdul Malek Ahmad JCA:

[1] The words "... no sale takes place by reason of the reserve price not being reached ..." appearing in r. 7(b) of the Rules envisage two possible situations, *viz*: (i) where there are **no bidders** in which event the reserve price can never be reached and, consequently, there is no sale; and (ii) where there are bidders but the bidding does not reach the reserve price in which event no sale can take place by reason of the reserve price not being reached.

[2] The discretion embodied in r. 7(a) of the Rules cannot be exercised by stipulating a fixed sum without hearing the auctioneer as each case has to be considered on its merits judicially.

[3] Upon their proper construction, r. 7(a) and (b) of the Rules prescribe that the taxing officer of the Court must exercise his discretion judicially in determining the remuneration of the auctioneer who is entitled to half the commission payable under r. 5 of the Rules calculated on such reserve price where no sale takes place by reason of the reserve price not being reached.

[4] The inherent jurisdiction of the Court under O. 92 r. 4 of the RHC cannot be used to deny an auctioneer of any legal right that may be vested in him under r. 7(b) of the Rules as procedural rules should not alter one's substantive rights.

[4] The circular was issued beyond the powers of the SAR; therefore, it was *ultra vires* the Rules and has no effect whatsoever.

[5] In issuing the circular, the SAR was not acting in a judicial capacity and was, therefore, not sheltered by s. 14 of the CJA. Consequently, the proceedings against her office were in order.

Per curiam

[1] Although no restriction appears in the National Land Code 1965 as to auction sales being held in States other than the State where the land is situated, it is more appropriate for the purposes of market valuation and reduced costing for charges to be executed in the State where the land is situated.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PELELONGAN & PELELONG: *Saraan Pelelong - Perlelongan yang batal - Tiada penawar - Perkiraan saraan berdasarkan pekeliling yang dikeluarkan oleh Penolong Kanan Pendaftar - Samada pekeliling ultra vires Enakmen Penjualan Perlelongan Johor 1932 dan Kaedah-kaedah yang dibuat di bawahnya - Samada Penolong Kanan Pendaftar telah bertindak secara kehakiman dalam mengeluarkan pekeliling - Samada Penolong Kanan Pendaftar terlindung oleh s. 14 Akta Mahkamah Kehakiman 1964 - Samada pelelong harus didengar - Samada pegawai pencukaian mesti melaksanakan budibicara secara kehakiman dalam menentukan saraan*

Responden yang merupakan pelelong berlesen di bawah Enakmen Penjualan Perlelongan Johor 1932 ('Enakmen'), telah menjalankan dua perlelongan bagi beberapa hartanah ('hartanah tersebut') di Pulau Pinang pada harga rizab sebanyak RM6 juta. Pada kedua-dua masa, perlelongan tersebut telah batal kerana ketiadaan penawar. Responden kemudiannya telah mengirimkan dua bil kepada Penolong Pendaftar Mahkamah Tinggi di Johor Bahru bagi jumlah sebanyak RM16,015.50 dan RM15,573.50 masing-masingnya, berdasarkan k. 7(b) Kaedah-kaedah yang telah dibuat di bawah Enakmen ('Kaedah-kaedah'). Selepas itu, responden telah menerima dua cek bagi nilai sebanyak RM908 dan RM466 sebagai penjelasan bagi bil-bil itu masing-masingnya. Ianya tidak dipertikaikan bahawa saraan responden telah dikira berdasarkan pekeliling ('pekeliling') yang telah dikeluarkan oleh Penolong Kanan Pendaftar ('PKP') Mahkamah Tinggi di Johor Bahru kepada pelelong-pelelongnya yang berdaftar.

Berasa tidak puashati, responden telah memohon untuk, antara lainnya, (i) satu pengisytiharan bahawa pekeliling tersebut adalah *ultra vires* Enakmen dan k. 7(b) Kaedah-kaedah dan, dengan itu, adalah batal dan tidak berkesan; (ii) pengisytiharan bahawa fee beliau bagi kedua-dua perlelongan yang batal itu berjumlah sebanyak RM16,015.50 dan RM15,573.50 masing-masingnya sepertimana menurut bil-bil beliau dan (iii) satu perintah bahawa perayu hendaklah membayar kepada beliau fee beliau yang mana masih belum dijelaskan. Di perbicaraan, pencelah telah membangkitkan bantahan awal bahawa permohonan responden di luar aturan, pra-matang dan suatu penyalahgunaan proses kerana responden masih mempunyai remedi untuk mengkaji-semula di bawah A. 59 kk. 34 dan 36 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim perbicaraan telah menolak bantahan awal tersebut berdasarkan A. 15 k. 16 KMT.

Perayu menegaskan bahawa: (i) k. 7(b) Kaedah-kaedah adalah tidak terpakai di mana harga rizab telah dirahsiakan dan penawaran telah bermula tetapi tiada penjualan berlaku kerana harga rizab masih belum dicapai; (ii) di mana sesuatu penjualan melalui perlelongan ditangguhkan oleh Mahkamah, Penolong Pendaftar mempunyai budibicara untuk menentukan saraan pelelong selaras dengan k. 7(a) Kaedah-kaedah atau di bawah bidangkuasa sedia ada Mahkamah selaras dengan A. 92 k. 4 KMT; (iii) pekeliling tersebut adalah satu garispanduan bagi pelaksanaan budibicara di bawah k. 7(a) Kaedah-kaedah; dan (iv) PKP, dalam mengeluarkan pekeliling, telah bertindak dalam kedudukan kehakiman dan, dengan itu, dilindungi oleh s. 14(1) Akta Mahkamah Kehakiman 1964 ('AMK'). Hakim perbicaraan telah membuat keputusan yang berpihak kepada responden, ekoran mana perayu merayu kepada Mahkamah ini.

Diputuskan:
Oleh Abdul Malek Ahmad HMR:

[1] Perkataan-perkataan "... no sale takes place by reason of the reserve price not being reached ..." yang terdapat dalam k. 7(b) Kaedah-kaedah membayangkan dua situasi yang kemungkinan berlaku, iaitu (i) di mana **tidak terdapatnya penawar** dalam keadaan yang mana harga rizab tidak mungkin boleh dicapai dan, akibatnya, tidak terdapat penjualan; dan (ii) di mana terdapatnya penawar tetapi tawaran tidak mencapai harga rizab, dalam keadaan yang mana tiada penjualan boleh berlaku kerana harga rizab tidak dicapai.

[2] Budibicara yang terdapat dalam k. 7(a) dan (b) Kaedah-kaedah tidak boleh dilaksanakan dengan menetapkan satu jumlah tetap tanpa mendengar pelelong kerana setiap satu kes haruslah dipertimbangkan berdasarkan merit-meritnya secara kehakiman.

[3] Berdasarkan tafsirannya yang betul, k.7(a) dan (b) Kaedah-kaedah menetapkan bahawa pegawai pencukaian Mahkamah mesti melaksanakan budibicaranya secara kehakiman dalam menentukan saraan pelelong yang berhak kepada setengah daripada komisyen yang kena dibayar di bawah k. 5 Kaedah-kaedah tersebut yang dikira atas harga rizab yang sedemikian di mana penjualan telah tidak berlaku disebabkan harga rizab yang tidak dicapai itu.

[4] Bidangkuasa sedia ada Mahkamah di bawah A. 92 KMT tidak boleh digunakan untuk menafikan apa-apa hak undang-undang kepada seorang pelelong yang mungkin terakru kepadanya di bawah k. 7(b) Kaedah-kaedah kerana peraturan prosedur tidak seharusnya meminda hak substantif seseorang.

[5] Pekeliling berkenaan telah dikeluarkan di luar kuasa-kuasa PKP; dengan itu, ianya *ultra vires* Kaedah-kaedah dan tidak mempunyai kesan sama sekali.

[6] Dalam mengeluarkan pekeliling, PKP tidak bertindak dalam kapasiti kehakiman dan adalah, dengan itu, tidak terlindung oleh s. 14 AMK. Akibatnya, prosiding terhadapnya adalah menurut aturan.

Per Curiam

[1] Walaupun tiada sekatan terdapat dalam Kanun Tanah Negara 1965 berhubung dengan penjualan perlelongan diadakan dalam Negeri-Negeri yang selain daripada Negeri di mana terletaknya tanah itu, ianya adalah lebih wajar untuk tujuan nilai pasaran dan kos yang berkurangan bagi gadaian-gadaian disempurnakan dalam Negeri di mana tanah itu terletak.

[Rayuan ditolak.]

Cases referred to:

Guaranty Trust Co. of New York v. Hannay [1915] 2 KB 536 CA ***(cit)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. ***(cit)***

Pyx Granide Co. v. Ministry of Housing & Local Government [1960] AC 260 ***(cit)***

Dr. Mahesan a/l Subramaniam, & 2 Ors. v. Ponnusamy a/l P. Rajoo & 3 Ors. [1994] 3 CLJ 438 ***(cit)***

Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor. [1979] 2 MLJ 101 ***(cit)***

Legislation referred to:

Auction Rules, rr. 5, 7(a), (b)

Courts of Judicature Act 1964, s. 14(1)

Johor Auction Sales Enactment 1932, r. 7(a), (b)
National Land Code 1965, ss. 256, 257(d)
Rules of the High Court 1980, O 15 r. 16, O. 59 r. 34, O. 92 r. 4

Other sources referred to:
Administrative Law of Malaysia and Singapore, M.P. Jain, pp. 383, 384
Halsbury's Laws of England, 4th Edn., Vol. 1(1), pp. 325, 326, 327
Mallal's Supreme Court Practice

[Appeal from High Court Malaya, Johor Bahru; Originating Summons No: 14-168-1994]

For the appellant - Amelia Tee Hong Geok, Senior Federal Counsel
For the respondent - Gana Muthusamy; M/s. Gana Muthusamy & Co.

JUDGMENT

Abdul Malek Ahmad JCA:

The undisputed facts in this case are as follows:

(a) the respondent is a licensed registered auctioneer under the Johor Auction Sales Enactment 1932 (hereinafter 'the Enactment');

(b) on 10 January 1993, the respondent was the auctioneer conducting an auction for lot Nos. 512 and 513, Title Nos. 35957 and 35958 respectively in the Daerah Timur Laut Negeri, Pulau Pinang (hereinafter 'the subject properties') at the reserve price of RM6 million;

(c) the said auction was abortive as there was no bidder whereupon the respondent sent a bill of RM16,015.50 to the Deputy Registrar of the High Court in Johor Bahru based on r. 7(b) of the rules made under the Enactment (hereinafter 'the Auction Rules');

(d) on or about 12 June 1993, the respondent received a cheque from the treasury for the total sum of RM908 in settlement of the said bill;

(e) on 31 July 1993, the respondent was also the auctioneer conducting an auction for the subject properties at the reserve price of RM6 million;

(f) the said auction was again abortive as there was no bidder and consequent thereto, the respondent sent a bill of RM15,573.50 to the Deputy Registrar of the High Court in Johor Bahru;

(g) on or about 16 November 1993, the respondent received a cheque from the treasury for the sum of RM466 in settlement of the said bill;

(h) the respondent believed that his auction fees for the said abortive sales were calculated on the basis of the circular dated 6 August 1992 which the respondent believes is *ultra vires* the Enactment and the Auction Rules;

(i) the Deputy Registrar of the High Court in Johor Bahru admitted that the above cheques were paid on the basis of the said circular under which the respondent was paid a fixed commission of RM100 apart from disbursements for each of the above abortive auctions.

The respondent had applied for:

(a) a declaration that the circular dated 6 August 1993 issued by the learned Senior Assistant Registrar of the High Court in Johor Bahru to the licensed auctioneers of that Court is *ultra vires* r. 7(b) of the Rules and is by reason thereof void and of no effect;

(b) a declaration that the abortive costs for the auction on 10 January 1993 in relation to the sale of the subject properties at the reserve price of RM6 million under r. 7(b) of the Auction Rules is RM16,015.50;

(c) a declaration that the abortive costs for the auction on 31 July 1993 in relation to the sale of the subject properties at the reserve price of RM6 million under r. 7(b) of the Auction Rules is RM15,573.50;

(d) an order that the appellant pay to the respondent the auctioneer's fees which have not been paid; and

(e) an order that the costs of these proceedings be borne by the appellant.

In the Court below, learned Counsel for the intervener had preliminarily objected to the procedure on the grounds that the application for the declarations was irregular, premature and an abuse of the process of the Court as the respondent had not exhausted the remedy namely for review available under O. 59 r. 34 of the Rules of the High Court 1980 (hereinafter 'the Rules') for the matter to be taxed by the Registrar.

The learned trial Judge did not agree in view of O. 15 r. 16 of the Rules which states that no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed citing in the process Tan Sri Chang Min Tat's commentary in *Mallal's Supreme Court Practice* on the same point and *Guaranty Trust Co. of New York v. Hannay* [1915] 2 KB 536 CA,

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.; Pyx Granide Co. v. Ministry of Housing & Local Government [1960] AC 260; [1959] 3 All ER 1 HL(E); *Dr. Mahesan a/l Subramaniam, & 2 Ors. v. Ponnusamy a/l P. Rajoo & 3 Ors.* [1994] 3 CLJ 438 [1994] 3 AMR 44 and *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor.* [1979] 2 MLJ 101.

The following issues had been agreed to in the Court below:

(a) what is the proper construction of r. 7 (a) and (b) of the Auction Rules;

(b) whether the learned Senior Assistant Registrar's circular dated 6 August 1992 is *ultra vires* r. 7(b) of the Auction Rules.

The relevant rule reads:

> 7. (a) Where the order for sale by public auction is cancelled or the sale is postponed by order of Court before the completion of the sale the remuneration of the auctioneer shall be at the discretion of the taxing officer.
>
> (b) Where property is put up by public auction but no sale takes place by reason of the reserve price not being reached the auctioneer shall receive half the commission which would have been payable under r. 5 calculated on such reserve price, provided that where at one sale the reserve price on some lots is reached and the reserve price on the other lots is not reached the sale price of the lots sold shall be aggregated with the reserve price of the lots unsold and the rate of commission on both the lots sold and the lots unsold shall be based on the total of such sale and reserve prices so aggregated.
>
> (c) Where, either before or after property has been advertised for sale, a sale, negotiated by the auctioneer, is approved by the Court, the auctioneer shall receive commission on the gross amount realised by such private sale as though it had been a sale by public auction.

For our purpose, It is also relevant to restate r. 5 of the Auction Rules.

> 5. When any property, movable or immovable, is sold by order of Court or under any law relating to the sale of distrained property by public auction through a licensed auctioneer such auctioneer shall be entitled to charge and be allowed a commission to be taxed by the Registrar or Assistant Registrar of the Court or Magistrate, as the case may be, according to the following scale, provided that the Court ordering sale may in its discretion approve any special rate of remuneration on either higher or lower than that provided in the scale:

Sales of Movable Property

Gross amount realised by sale for calculating percentage commission		Percentage commission
On the first RM500	...	7 per centum
On the excess over RM500 up to RM1,000	...	5 per centum
On the excess over RM1,000 up to RM5,000	...	3 per centum
On the excess over RM5,000 up to RM10,000	...	2 per centum
On the excess over RM10,000	...	1 per centum.

Sales of Immovable Property

Gross amount realised by sale for calculating percentage commission		Percentage commission
On the first RM500	...	4 per centum
On the excess over RM500 up to RM1,000	...	3 per centum
On the excess over RM1,000 up to RM5,000	...	2 per centum
On the excess over RM5,000 up to RM10,000	...	1 per centum
On the excess over RM10,000	...	½ per centum

The appellant's view is that the respondent's claim has no merit as r. 7(b) of the Auction Rules is only applicable where the reserve price is kept secret, bidding has started but there is no sale as the reserve price has not been reached.

It is also the appellant's contention that where the auction is cancelled or adjourned by the Court, the Deputy Registrar has a discretion to prescribe the fees pursuant to r. 7(a) of the Auction Rules or alternatively under the inherent Jurisdiction of the Court pursuant to O. 92 r. 4 of the rules.

The learned Senior Federal Counsel had referred to the relevant circular the translation of which is reproduced here to appreciate its full implication and effect:

Our Ref: (5)dlm.PMT.JB.2/(A)
Jld.4
Date: 6 August 1992.

To:

The Licensed Auctioneer,
High Court,
Johor Bahru.

Dear Sir/Madam,

Re: Auctioneers' Bills presented to the High Court, Johor Bahru

I refer to the abovesaid matter and the circular of this office Bil. (116) dlm. PMT. JB. 2/(A) Jld. 4 dated 26/8/90 with regard to the abovesaid matter and please be informed that this office will make the necessary amendment on the claims allowed and is limited to the claims put forward to this office.

2. For your knowledge, the purpose of this amendment is to standardise a reasonable scale where you are allowed to make claims to this office for certification and payment.

3. In view of that, below I hereby list down the necessary particulars of the claim to be complied by all auctioneers dealing with the auction sales at the High Court Johor Bahru as follows:

	Claims allowed	Amount of claim allowed/ limited	Note
3.1	To prepare notice of sale plus conditions of sale and draft order. (Claims to be prepared together and not separately).	RM160	This claim is based on 4 languages i.e. 200 set x 0.20¢ x 4 languages = RM160. To enclose receipt for claim exceeding the limit allowed
3.2	Transport expenses including inspection of location of property.	RM20 to RM50	Claim is based on location of said property.
3.2	(*) For own transport used the rate is 0.35¢ per one km.		Fare for out of districy will be considered on the distance.

3.3	Affidavit	RM4.50 to RM10	Based on the affidavit stamp and payment to the Commissioner for Oaths produced to the Court	*a*
3.4	Original copy of Notice of Sale and notice of conditions of auction sale	RM4	Based on 4 set x RM1 x 4 languages	*b*
3.5	Bell man	RM20	Claim includes cost for transport during the auction proceeding.	*c*
3.6	Title search	RM50	To produce receipt of payment. Claims **without receipt** will be rejected.	*d*
3.7	Out of pocket expenses	RM150	Claim includes the expenses to distribute the notice of sale, to put up the notice, taking photographs and other miscellaneous expenses in respect of the auction sale. **Please record in detail the expenses incurred.**	*e* *f*
3.8	Auctioneer's commission (auction sale)	RM100	Commission is based where there are no buyers and also the last minute postponement of the auction sale subject to arrangements having been made or prepared.	*g* *h*

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2. You are required to comply in full the regulations stipulated above when producing the claim to this office from time to time.

3. This Circular come into effect from 1/9/92. Circular letter bil. (116) dlm. PMT.JB.2/(A) dated 26/8/90 is cancelled.

Thank you.

"Berkhidmat Untuk Negara"

Sgd.

(Tan Poh Lai)
Senior Assistant Registrar,
High Court,
Johor Bahru

As for r. 7(b) of the Auction Rules, the learned Senior Federal Counsel contended that there must have been some bidding which failed to reach the reserve price. She maintained that r. 7(b) of the Auction Rules is obsolete although r. 7(a) of the Auction Rules is still applicable. This is because the Auction Rules were made in 1932 and circumstances have changed. In the late seventies, she said, it was the practice to keep the reserve price sealed in an envelope. The secrecy was to prevent the manipulation of the price. She reiterated that the respondent was entitled to half the commission if there was bidding.

As for the circular being *ultra vires* the Enactment, she said that it was a guideline for the exercise of discretion under r. 7(a) of the Auction Rules. She had referred to M.P. Jain's *Administrative Law of Malaysia and Singapore* at pp. 383 and 384 which states:

Fettering Discretion

A version of non-application of mind by an authority in exercising its discretion arises when it lays down a policy to regulate the exercise of its discretion, and seeks to apply the policy inflexibly to all cases coming before it for decision irrespective of the merits of an individual case. This is called as fettering discretion, and is held invalid on the ground that when a statute confers discretion on an authority, it is expected to consider each case on its merits, rather than adopt an inflexible standard and apply it to each and every case. The Courts do not approve of an authority fettering its discretion by adopting a policy and applying it generally to all cases irrespective of their merits and thus preventing itself from applying its mind to the circumstances of each case. To illustrate the point, discretion is given to the commissioner of police to refuse to grant a licence for any carriage which he thinks to be unfit for public conveyance. He lays down in a general order the details of construction which each carriage should satisfy before it can be licensed. He even gets a model

carriage prepared as per his specifications and insists that each carriage must conform with that model otherwise it would not be licenced. Such an order is illegal because the licensing officer instead of exercising his discretion after examining each individual carriage and considering whether it is fit or unfit for public conveyance, he fetters his discretion with an inflexible norm and prevents himself from considering the merits of each particular carriage.

But this does not mean that an administrative authority may never lay down a general norm for guidance in exercising its discretion. In fact, there may be circumstances when it may be advisable for the authority to do so, e.g., when the authority has to dispose of a large number of cases of one and the same type, or where under a statute cases have to be disposed of by multiple authorities of the same rank. In such circumstances, general policy will achieve consistency, co-ordination and uniformity of approach in similar fact-situations and this may be necessary for effective administration. But a balance has to be struck between the desirability of laying down general policy and the duty of the authority concerned not to fetter its discretion completely or irrevocably. Such a balance is achieved when the authority lays down a general policy for exercising its discretion, but at the same time keeps its option open to consider whether in a particular case on merits that policy should be applied or not. He should consider a case on its merits if it does not fall within the general policy laid down by him, or if there are circumstances which may justify non-application of the policy to the specific case.

She had also drawn our attention to s. 14 of the Courts of Judicature Act 1964 where sub-s. (1) thereof is relevant and which state:

Protection of Judges and other judicial officers.

14(1) No Judge or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

She had also cited Vol. 1(1) of *Halsbury's Laws of England*, 4th Edn. at pp. 325 where para. 214 opens with "To entitle any person to the protection of judicial privilege, the proceedings out of which the action arises must be the judicial proceedings of a tribunal which is, in the eyes of the law, a Court," and p. 326 at para. 215 which provides that "The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings; and, where a Judge acts both judicially and ministerially or administratively, the protection is not afforded to acts done in the latter capacity."

The question is whether the Senior Assistant Registrar was acting in a judicial or administrative capacity in issuing the circular as she did. At p. 327 of the same volume of *Halsbury's* it is stated as follows:

> Duties, however, which are partly judicial and partly ministerial, such as the duty of admitting to bail, are not severable so as to admit of liability for any part of the acts done in fulfillment thereof.
>
> 1. Thus, while the taxation of a bill of costs by a master of the High Court is a judicial proceeding, and written statements by a solicitor in the objections lodged in the taxation are absolutely privileged (*Pedley v. Morris* [1891] 61 LJQB 21, DC), the delivery of a bill of costs to a client by a solicitor under an order of the Court is not a judicial proceeding and is not so privileged (*Bruton v. Downes* [1859] 1 F & F 668); ...
>
> 2. A Magistrate is entitled to immunity only so far as he acts judicially, not in the exercise of other administrative discretion (*Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [1892]1 QB 431 at 453, CA, per Lopes LJ) ... .

In conclusion, the learned Senior Federal Counsel submitted that pursuant to O. 59 r. 34 and 36 of the Rules, the respondent should have applied for a review as applying for a declaration is not the proper remedy.

Learned Counsel for the respondent replied that the respondent in this case was never heard and this apparently is the practice in Johor Bahru. This was a fundamental breach of natural justice, he added, and undermines the judicial powers and authority.

He submitted that if the Court rules that r. 7(b) of the Auction Rules applies, then the circular is overruled. He said that the chargee had applied to intervene but had subsequently decided not to appeal. The circular had actually imposed a limit but there was no hearing for the respondent's claims.

He argued that the Senior Assistant Registrar was not acting in a Judicial capacity as she applied the circular in her administrative capacity. Learned Counsel also said that the respondent was not a party to the proceedings and so he could not ask for a taxation review. Applying for a declaration as he did was the only course he could take.

In his application, the respondent had cited the Minister of Law and the Government of Malaysia as parties but the learned Judicial Commissioner on 29 July 1994 had advised him not to proceed against them on which advice he had complied. Learned Counsel ended his arguments by saying that the circular was null and *ultra vires* the Enactment as the absence of bidding does not mean that no work had been done.

The learned trial Judge had disagreed with the view of the learned Senior Federal Counsel. He had said that to the best of his knowledge and belief, it has become an established practice of the Court not to keep the reserve price as a guarded secret but to state it specifically in the proclamation of sale. It is also the requirement under s. 257(d) of the National Land Code 1965 that every order for sale by the Court under s. 256 of the Code shall require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

As for the words "where property is put up by public auction but no sale taken place by reason of the reserve price not being reached" in r. 7(b) of the Auction Rules, the learned trial Judge reiterated that two situations may arise. One is that there are no bidders in which event the reserve price can never be reached and consequently there is no sale, and the other it where there are bidders but nevertheless the bidding did not reach the reserve price in which event no sale can take place by reason of the reserve price not being reached.

As for the construction of r. 7(a) of the Auction Rules, it is the considered view of the learned trial Judge that the discretion stated therein cannot be exercised by stipulating a fixed sum of RM100 without hearing the respondent as each case has to be considered on its merits judicially. It was also his considered opinion that the inherent jurisdiction of the Court under O. 92 r. 4 of the Rules cannot be used to deny the respondent of any legal right that may be vested in him under r. 7(b) of the Auction Rules as procedural rules should not alter one's substantive rights.

As for the Senior Assistant Registrar's circular, the learned trial Judge stated that the power to make rules under the Enactment has been conferred upon the Minister under s. 12 and not upon any other person. The effect of the circular is to make rules as regards the fees due and payable to licensed auctioneers having conduct of auction sales in the High Court at Johor Bahru although the learned Senior Assistant Registrar has been given the discretion under r. 5 to approve any special rate of remuneration which must be exercised judicially. The learned trial Judge consequently held the Senior Assistant Registrar's circular to be null and void and of no effect whatsoever.

We have carefully considered the reasoning of the learned trial Judge in his judgment and agree with him on both issues namely the proper construction of r. 7(a) and (b) of the Auction Rules is that the taxing officer of the Court is to exercise his discretion judicially in deciding the remuneration of the auctioneer involved who is entitled to half the commission payable under r. 5 of the Auction Rules calculated on such reserve price where no sale takes place by reason of the reserve price not being reached, and as for the circular,

it is beyond the powers of the Senior Assistant Registrar to do so and it is therefore *ultra vires* the Auction Rules and has no effect whatsoever.

Since the Senior Assistant Registrar in this instance was not acting judicially in issuing the circular, she is not sheltered by s. 14 of the Courts of Judicature Act 1964 and the proceedings here against her office are quite in order.

We are only bothered by one other fact. In preparing this judgment, we had discovered that the subject properties in question are located in Penang and not in Johor Bahru and although no restriction appears in the National Land Code 1965 as to auction sales being held in States other than the State where the land is situated, it would appear to be more appropriate for the purposes of market valuation and reduced costing for charges to be executed in the State where the land is located. However, we hold that since the arrangements for the auction sales had already taken place, the respondent is entitled to the commission payable as per the declarations applied for and consequently granted. Accordingly, we dismiss the appeal with costs and the deposit is to be paid to the respondent to account of his taxed costs.

Reported by Gan Peng Chiang